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No. 98-517

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In The

Supreme Court of the United States

October Term, 1998

MICHAEL D. MILLER,

Petitioner,

vs.

JIM ALLEN, individually, TOM DIXON, individually, STANTON GIDEONS, JR., individually, BILLY RUTTER, individually, JOHN STEPHENS, individually, SUMTER COUNTY, FLORIDA, CASSIE BROWN, and CHARLES R. BROWN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Respondents assert that the Petitioner has erroneously characterized the issues presented and decided by the district court and Eleventh Circuit Court of Appeals in this case and therefore the Respondents present the following questions at issue:

1. Does the substantive component of the Fourteenth Amendment's Due Process Clause afford protection to a citizen's state-created rights?

2. Does a person suffer a procedural due process violation if the State provides adequate and available post-deprivation remedies?

3. Does the Due Process Clause of the Fourteenth Amendment require the State to protect its citizens from the actions of private actors?

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RESPONDENT'S REQUEST TO DENY PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully pray that this Honorable Court deny the Petitioner's request for a writ of certiorari and affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

JURISDICTION

The Respondents deny that this Court has jurisdiction in this matter because there is no conflict among the circuit courts regarding the rights protected under the substantive and procedural components of the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

On May 22, 1996, Petitioner Michael D. Miller ("Miller") filed his Complaint in the United States District Court, Middle District of Florida, Ocala Division. Miller's complaint was filed pursuant to 42 U.S.C. §1983 alleging in Count One a violation of Miller's Fourteenth Amendment substantive and procedural due process rights by Sumter County, Florida and five members of the Sumter County Board of Commissioners in their individual and official capacities ("County Defendants"). The County Defendants asserted that the Eleventh Circuit does not recognize a claim for violation of substantive due process where the claim is based on a state-created right. The County Defendants also asserted that Miller was not

denied procedural due process because the State of Florida provided adequate post-deprivation remedies. On July 9, 1997, the County Defendants filed their Motion for Summary Judgment, Statement of Facts and Memorandum of Law in Support of their Motion for Summary Judgment which presented arguments that: (1) Miller's state-created property rights were not entitled to substantive due process protection; (2) Miller was not denied procedural due process because adequate state post-deprivation remedies were available; and (3) the Due Process Clause does not require the state to protect citizens against the actions of other private actors. On September 5, 1997, the District Court granted the County Defendants' Motion for Summary Judgment and issued an order with supporting Memorandum of Law. (See Petitioner's Appendix 4)

On September 16, 1997, Miller filed a Notice of Appeal with the Eleventh Circuit Court of Appeals and after timely briefs were filed and the parties presented their positions during oral argument, the Eleventh Circuit issued a *per curiam* opinion affirming the district court's decision. (See Petitioner's Appendix 23) On July 13, 1998, the Eleventh Circuit denied Petitioner's request for rehearing.

STATEMENT OF THE FACTS

On April 12, 1991, Sumter County issued a Vested Mine Registration and Operating Permit to Charles and Cassie Brown as property owners, and to Albert Bori d/b/a Central Florida Excavating as the mine operator

for a one hundred two (102) acre tract of land located in Sumter County, Florida. In accordance with Sumter County Ordinance 90-12 ("mining ordinance"), the permit was issued jointly to the property owner and designated mine operator, and required that any change in the owner or operator be reported to Sumter County in writing within 30 days of such change. The mining ordinance does not require the County's consent or approval of the change in owner or operator, but simply requires written notification. It simply requires notification.

In September, 1991, shortly after the issuance of the mining permit, the Browns apparently were in default with respect to their obligations under the terms of an outstanding mortgage on the subject property. The Browns entered into an agreement with the Petitioner Michael D. Miller ("Miller") under which Miller paid a certain sum to be used to cure the default under the mortgage and in return, the Browns gave Miller a Bill of Sale for the lime rock which had already been mined, as well as an option to purchase the property or lease it for the excavation of lime rock.

In March 1992, Miller, apparently in an effort to comply with the mining ordinance, notified Sumter County that one of his corporations had assumed ownership and requested to be listed as mine operator for this property. Mine operations began in June, 1992 and continued until August, 1992, at which time business dealings between Miller and the Browns apparently broke down. The Browns filed suit against Miller in state court, and from that point on Miller was denied physical access to the mine and the mine's operations. The Browns' cause of action was eventually dismissed for failure to prosecute.

In February, 1993, Miller wrote to the Planning, Zoning, and Building Department of Sumter County asserting that persons other than those designated on the mining permit were operating the mine and requesting cancellation of the mining permit on that basis. Thereafter, on May 24, 1993, Sumter County received notice in the site's annual mining report that the Browns were the owners of the property and Central Florida Excavating, Inc. was the operator of the mine. These notices were sent in order to comply with the notification requirement of the mining permit. On March 3, 1994, Miller appeared at a public meeting of the County Defendants and complained about the mine operations. On March 9, 1994, Miller returned to a public meeting of the Board of Commissioners. During this meeting, the County Defendants explained to Miller that his dispute was with the Browns and that they would not become involved in the dispute over the operation of the mine. However, in an attempt to clarify the issue of ownership regarding the mine, the County Defendants sent a letter to the Browns on July 26, 1994, requesting that the Browns provide written notification concerning the identity of the current owners and operators of the mine. On August 3, 1994, the Browns notified Sumter County that they were the sole owners and operators of the mine.

On February 7, 1995, Miller again appeared at a public meeting of the County Defendants and again claimed that unauthorized parties were operating the mine. Members of the County staff stated that they had been notified that the Browns were the land owners and mine operators. Once again, the County Defendants

informed Miller that the dispute was a "matter of litigation between Miller and the Browns" and that the Board will "not get involved in a private litigation."

The Browns' mining operations continued on the property until the permit was suspended on February 14, 1995 by the County Defendants after a finding that the terms of the permit had been violated. The violations related to the depth of mining, set back requirements, and other specifications of the permit and not related to the identity of the mine operator. Miller took no other action and failed to seek any remedy or relief until the filing of the underlying action in May 1996.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

This appeal is based on the final judgment entered by the Honorable William Hodges of the United States District Court, Middle District of Florida, Ocala Division in favor of Sumter County and five individual county commissioners (hereinafter referred to as County Defendants). The County Defendants were granted summary judgment from a complaint filed by Petitioner, Michael D. Miller (Miller) alleging that Sumter County and each county commissioners violated Miller's procedural and substantive due process rights protected by the Fourteenth Amendment of the U.S. Constitution. On appeal, the Court of Appeals for the Eleventh Circuit issued a *per curiam* opinion affirming the district court's decision.

NO CONFLICT AMONG CIRCUIT COURT DECISIONS

This Court should deny the Petition for Writ of Certiorari because there is no conflict between the Eleventh Circuit's decision and the decisions of other circuits as alleged in Petitioner's brief.

Petitioner's original complaint only asserts claims under the procedural and substantive components of the Due Process Clause of the Fourteenth Amendment. The district court's opinion relied on *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995) and this Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). The Petitioner asserts however, that the decision is in "conflict" with authority from other circuits on the issue of "constitutionally protected" property interests. Respondents submit that the cases relied upon by the Petitioner are inapplicable and irrelevant because these cases involve "just compensation taking" claims under the Fifth Amendment rather than the substantive and procedural components of the Due Process Clause of the Fourteenth Amendment. *See*: *Florida Rock Industries, Inc. v. U.S.*, 791 F.2d 893 (Fed. Cir. 1991) (eminent domain; Fifth Amendment); *Dunbar Corporation v. Lindsey*, 905 F.2d 754 (4th Cir. 1990) (Fifth Amendment); *Whitney Benefits, Inc. v. U.S.*, 926 F.2d 1169 (Fed Cir. 1991) (Eminent Domain; Fifth Amendment); *United Nuclear Corp. v. U.S.*, 912 F.2d 1432 (Fed Cir. 1990) (Eminent Domain).

These cases do not conflict with the Eleventh Circuit's decision in *McKinney*, wherein the Court relied on the binding precedent established in *Palko v. Connecticut*,

302 U.S. 319 (1937); *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) and *Regent of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985). These Supreme Court cases clearly established that the rights protected under the substantive component of the Due Process Clause of the Fourteenth Amendment must be "fundamental" rights and not state-created rights such as those based in property, employment, and tort law.

Since Petitioner has not asserted a violation of his rights, if any, under the Fifth Amendment in his original Complaint, this Court should not grant certiorari in this matter because there is no conflict between the circuits regarding rights protected under the Due Process Clause of the Fourteenth Amendment.

SUBSTANTIVE DUE PROCESS

The district court's September 5, 1997 opinion held that Miller's claim failed to support a violation of substantive due process because, in accordance with the holding in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995), the Eleventh Circuit does not recognize claims of substantive due process where the claim is based on a state-created right rather than a "fundamental" right protected by the Constitution. This Court defined the scope of the "fundamental" rights protected under the substantive component of the Due Process Clause as the rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The district court properly held that Miller's property interest, if any, in a mining permit was a state-

created right and thus not protected by the substantive component of the Due Process Clause of the Fourteenth Amendment. It is well established that land use rights are state-created rights and are not entitled to substantive due process protection. *See: Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972); *DeKalb Stone Inc. v. County of DeKalb,* 106 F.3d 956 (11th Cir. 1997); *Sullivan Properties, Inc. v. City of Winter Springs,* 899 F.Supp. 587 (M.D. Fla. 1995). This Court as well as the Eleventh Circuit have clearly established that property rights created by state law, such as tort and employment law, should not be afforded substantive due process protection. *See: Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 229 (1985) (substantive due process rights are created only by the Constitution); *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994), *cert. denied,* 513 U.S. 1110 (1995). It is also well established that land use rights are property rights which are not created by the Constitution. "Land use rights are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth,* 408 U.S. at 577. The district court correctly held that the interpretation and enforcement of the mining ordinance by Board of County Commissioners was an executive act as opposed to a legislative act and thus under *McKinney,* Miller had no claim for a substantive due process violation.

Miller's complaint only asserted claims arising under the substantive and procedural components of the Due Process Clause of the Fourteenth Amendment and not a violation of his property rights, if any, under the Fifth

Amendment. Petitioner's reliance on Fifth Amendment cases from other circuit court decisions is misplaced and irrelevant when considering an alleged violation under the Fourteenth Amendment's Due Process Clause. This Court has clearly established that rights protected by the substantive component of the Due Process Clause must be "fundamental" deriving from the Constitution rather than "state-created" rights. This protection is not analogous to the property rights created by the Fifth Amendment. Since Petitioner's cited cases are not analogous to the binding precedent established in *McKinney* regarding due process claims, the petition for writ of certiorari should be denied.

PROCEDURAL DUE PROCESS

The Petition for Writ of Certiorari should also be denied because the district court and the Eleventh Court of Appeals, by its affirmation, correctly held that Miller did not suffer a violation of his procedural due process rights because he had available and adequate post-deprivation remedies, (i.e., injunction, mandamus, certiorari or declaratory relief) provided by the State of Florida.

The County Defendants assert that Miller's procedural due process claim is barred because the State of Florida provided adequate post-deprivation remedies. Miller failed to demonstrate to the district court that he did not have adequate remedies available, and therefore, the County Defendants' motion for summary judgment as to the procedural due process claim was correctly granted as a matter of law. The Eleventh Circuit has previously

held that "procedural due process violations do not become complete 'unless and until the state refuses to provide due process.' " *McKinney*, 20 F.3d at 1562 (*quoting Zimermon v. Burch*, 494 U.S. 113, 123, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990)). "A state may provide a post-deprivation remedy to cure any procedural defects in the deprivation; it is only when the state refuses to provide such a post-deprivation remedy that a violation sufficient to support a claim under 42 U.S.C. §1983 arises." *Id.* Thus, even if Miller had suffered a procedural deprivation by the County Defendants, "he has not suffered a violation of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation." *Id.* at 1563.

Since it is uncontroverted that the State of Florida provides adequate post-deprivation remedies, the district court and the court of appeals correctly found no violation of the petitioner's procedural due process rights.

PRIVATE ACTORS UNDER *DESHANEY*

Finally, the district court held that Miller's substantive due process claim was governed by the precedent established in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, this Court held that the Due Process Clause does not require the State to protect the interest of its citizens from the actions of other private actors. As Miller's claim arose out of a private contractual dispute with the property owners (Browns), the protections of due process were not implicated. The district court's order granting the County

Defendant's motion for summary judgment correctly ruled that the deprivation of property rights, if any, were made by private actors and not by the County Defendants. Thus, where the action derives from a private actor, the County Defendants did not have a duty to intervene and protect Miller from these actions. Since Miller's entire claim centered on a contract dispute between himself and the Browns, the district court correctly noted that this case fell under the holding in *DeShaney*. In *DeShaney*, this Court stated "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. The purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196. Finally, this Court stated in *DeShaney*:

> If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Id. at 196-7.

Therefore, this Court should deny Petitioner's request for the issuance of a Writ of Certiorari because the district court's ruling correctly determined that this case is governed by the holding in *DeShaney* and thus the

Petitioner had no claim against the County Defendants for violation of the Due Process Clause.

CONCLUSION

Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari sought in this case because Petitioner has failed to demonstrate any "conflict" among the circuit court decisions regarding the rights protected under the Due Process Clause of the Fourteenth Amendment and hence this Court lacks jurisdiction over this case. Also, Petitioner has failed to demonstrate a violation of a "constitutionally protected" interest under the Fourteenth Amendment because Miller's alleged right in the mining permit, if any, is a state-created right and not a "fundamental" right derived from the Constitution. Since Miller's alleged right is outside the scope of substantive due process jurisprudence, the district court correctly granted summary judgment in favor of the County Defendants. Further, Petitioner failed to show that he was denied procedural due process because the State of Florida provided adequate post-deprivation remedies to cure any deficiencies. Finally, this Court's ruling in *DeShaney* clearly establishes that the County Defendants could not violate the Due Process Clause because they owed no duty to Miller to protect him from the actions of private actors. Therefore, based

on the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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